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# The effective public enforcement of cartels: perceptions on the functioning of the objection procedure and the reality

*Annalies Outhuijse*

## 1 Introduction

The Dutch competition authority, the Authority for Consumers and Markets (ACM), can impose significant fines for infringements of the cartel prohibition.<sup>1</sup> As previous research showed, fined undertakings often file appeals and further appeals against these fining decisions at the two specialised courts, the District Court Rotterdam and the Trade and Industry Appeal Tribunal (TIAT) (Outhuijse 2017, 2018).<sup>2</sup> Pursuant to Dutch procedural rules, an undertaking must first lodge an objection with the ACM before it can dispute the alleged infringement at the District Court Rotterdam. Under this objection procedure, the ACM has to completely review its original fining decision on the basis of the undertaking's objections and can decide to confirm, amend or withdraw its original fining decision in its decision on the objection.<sup>3</sup> This additional administrative procedure is meant as a procedure for solving disputes between citizens and the government, so that lengthy, formal legal procedures before the administrative court can be avoided.<sup>4</sup>

The effectiveness and added value of this objection procedure in case of cartel fines has been questioned regularly, including because of its limited ability to resolve disputes and the costs and duration of this procedure (inter alia Biesheuvel 1996; Scholten 2002; Van der Meulen 2002; Wesseling & Ten Have 2013; Wiggers et al. 2014; Custers et al. 2016). The need for the procedure was also debated during the legislative process which established the ACM in 2013 by merging the Dutch competition authority (NMa) with the Independent Post and Telecommunications Authority of the Netherlands (OPTA) and the Netherlands Consumer Authority (CA). The first draft of the legislative bill establishing the ACM included a proposal to abolish the objection procedure for ACM sanctioning decisions. The supporting arguments were that the aims of the objection procedure were not being met, as it was proving unable to sufficiently resolve disputes, and abolishing the procedure would save both time and money (Jans & Outhuijse

1 The terms cartel and anti-competitive agreements are used as synonyms in this article.

2 The European competition law prohibitions, articles 101 and 102 TFEU, address undertakings and associations of undertakings and therefore this term is used instead of, for example, companies or businesses.

3 Article 7:11 General Administrative Law Act (GALA).

4 PG Awb I, p. 279; available at [www.pgawb.nl](http://www.pgawb.nl).

2013).<sup>5</sup> On receiving a negative advice from the Council of State, the legislator decided not to abolish the objection procedure, but it did adopt an important change to the procedure, as will be described in the next section.

In light of the discussions on the effectiveness of this procedure, this article analyses the ability of the cartel objection procedure to resolve disputes. Therefore, an analysis of the decisions on objection was carried out, as well as interviews with the parties involved and a study of the relevant literature. The article begins with a description of the objection procedure applied by the ACM in cartel cases. Subsequently, the experiences are described of 14 legal practitioners and 3 ACM officials who were regularly involved in the decision-making and dispute resolution procedures in cartel fine cases. The perceptions and experiences presented are then verified by an analysis of the decisions on objection in all cases since 1998. Finally, analysed literature showed that the success of the objection procedure, regarding dispute resolution, depends on the nature of the dispute, the reason that the objection is made and the organisation of the procedure. Reviewing the data which was gathered through the interviews and case analysis with the knowledge of these factors influencing the success of the objection procedure leads to the conclusion, that these previous studies can explain the limited ability of the cartel objection procedure to resolve disputes.

## 2 Introduction to the cartel objection procedure

Article 7:1 of the Dutch General Administrative Law Act (GALA) contains the general procedural rule that an interested party must lodge an objection with the administrative authority which adopted the disputed decision before an administrative court can hear the appeal. Access to court is therefore in principle denied until the administrative authority has reviewed its decision. This general procedural rule also applies to cartel fining decisions. The Netherlands is not unique in having an extra administrative step which precedes the court procedure in these types of cases. The fining decision is also reconsidered, for example, by the competition authority before the undertaking can challenge it in court in Germany, the Czech Republic and Poland. The same officials within the competition authority reconsider their decision in Germany.<sup>6</sup> In the Czech Republic and Poland, the reconsideration is conducted by different officials within the competition authority (European Commission 2014, p. 92; Kowalik-Bańczyk et al. 2016, p. 227-228).

The fined undertaking in the Dutch cartel objection procedure can dispute the fining decision on all possible points: the qualification of the facts, the evidence of the infringement, the compliance with the relevant procedures, the amount of

5 See pages 14-16 draft explanatory memorandum which is available via: [www.internetconsultatie.nl/materielewetacm/details](http://www.internetconsultatie.nl/materielewetacm/details). Final version: *Parliamentary Papers* II 2012/13, 33 622, nr. 3. The abolishment of the objection procedure was already topic of discussion during the establishment of the competition authority as independent authority. See *Parliamentary Papers* II 2001/02, 27639.

6 Article 69(1) Gesetz über Ordnungswidrigkeiten.

the fine and the interpretation of the law. The ACM is obliged to reconsider its decision completely on the basis of the undertaking's objections.<sup>7</sup> It is important to note that *reformatio in peius* is not permitted, which means that the objection cannot cause the undertaking to end up in a worse position than it was before the objection.<sup>8</sup> Before 1 August 2014, the Dutch competition authority was obliged to involve an external advisory committee in this objection procedure.<sup>9</sup> This committee of legal and economic experts would provide non-binding advice about the objection decision (Jans & Outhuijse 2013). The Act which established the ACM was amended to free the competition authority from the obligation to involve an external advisory committee from 1 August 2014, and the ACM has stopped involving the committee in new cases commenced since then.<sup>10</sup>

As described in the literature, the objection procedure in cartel cases is very similar to a first instance appeal before the administrative courts and could be termed 'semi judicial' (Jans & Outhuijse 2013). The approach is highly formal: After the written objection is received, a hearing is organised which is similar to a hearing before an administrative court since both parties explain their view and previously the external committee questioned the parties. This format is reinforced by the fact that the 'individual' in the proceedings is mostly a professional organisation represented by highly qualified lawyers (Jans & Outhuijse 2013). The ACM is generally represented by at least a lawyer from its legal department, sometimes supplemented by economic expertise from within the organisation. In other words, the debate at the hearing is a professional one between subject matter experts. Beyond its procedural format, the objection procedure is also very similar to the first instance court procedure in the sense of what is reviewed. The central focus in cartel objection procedures is the legality of the fine.

Although the objection procedure is a mandatory pre-trial procedure, individuals have been able to bypass the objection procedure since 1 September 2004. Pursuant to Article 7:1a GALA, an undertaking which lodges an objection can request the ACM to consent to a direct appeal to the District Court Rotterdam. Under the second and third paragraph of Article 7:1a, the ACM may consent to the request if the case is suitable for this procedure, but must refuse if one of the other parties wants to follow the objection procedure. If the ACM consents, the ACM will forward the undertaking's objection to the District Court Rotterdam and the grounds for objection will thereby automatically become the grounds for appeal. A number of undertakings have successfully requested bypassing the objection procedure and proceeded immediately to court. Given the total number of cases, the direct appeal option is only occasionally used in cartel fine cases. To put that concretely in numbers: the ACM has imposed fines in 22 cartel cases since 2010. At least one or more undertakings lodged an objection in 19 of the 22 cases, representing 86% of cases, while commencing an objection procedure remains

7 Article 7:11 GALA.

8 Ibid.

9 The Article 92 Dutch Competition Act (old).

10 The main reason for making the advisory committee optional was to shorten the duration of the procedure.

possible in one more case.<sup>11</sup> The undertakings successfully requested bypassing the objection procedure in 4 of the 19 cases. This occurred in *Ship waste collectors* (2011), *Bell Peppers* (2012), *Silver Onions* (2012) and *Planting Onions* (2012). The objection procedure was followed in the other 15 cases. Only in 2 cases did none of the undertakings lodge an objection with the ACM or request a direct appeal. A total of 171 undertakings were fined since 2010, of which 30 accepted the fine (17%), 126 followed the objection procedure (74%) and 15 successfully filed a direct appeal (9%). Before 2010, the undertakings successfully requested a direct appeal in only 1 case out of a total of more than 20 cases in which this option was possible. In sum, many undertakings followed the objection procedure to dispute the fining decision.

The objection phase is not the first opportunity for an undertaking to dispute an alleged infringement. Before the ACM's Directorate of Legal Affairs issues a fining decision, the undertaking can dispute the alleged infringement as described in the penalty report received from the ACM's Competition Department in both a written and oral procedure (see about the practice Beumer 2016). The literal translation of this procedure's name is a 'view' procedure, and it is organised by the Directorate of Legal Affairs, which is a separate department to the Competition Department.<sup>12</sup> The penalty report contains information on the procedure, the nature of the evidence, an extensive review of the case's facts and circumstances, a legal qualification of these facts (*e.g.* agreement or concerted practice), an assessment in the light of the relevant legal provisions (article 6 Competition Act, article 101 TFEU), all of which can be disputed. The report does not contain a draft fining decision or other information about the fine to be imposed. The decision to impose a fine is made by the Directorate of Legal Affairs after this procedure.<sup>13</sup> Even though the objection phase is not the first opportunity for the undertaking to dispute the infringement, it is the first time the undertaking can dispute the amount of the fine and its calculation.

According to the explanatory memorandum of the GALA, the purpose of the objection procedure – offering an easily accessible, informal procedure – was to avoid large numbers of appeals to the administrative courts. During the objection procedure, the administrative authority would have the opportunity to repair obvious and simple errors by either making a new decision or improving the argumentation of the original decision, so that disputes between individuals and the administration could be resolved more efficiently and the number of judicial appeals are reduced (Jans & Outhuijse 2013). In practice, a large majority of the administrative disputes are ended in the objection procedure (see *inter alia* Van Erp & Klein Haarhuis 2006; Marseille et al. 2017; Van Ettehoven & Marseille 2017; Mein 2015; Commissie Ottow 2016; Roth 2018). As mentioned in the introduction, this is different for cartel cases. Previous studies have shown that undertakings file an appeal with the District Court Rotterdam in more than 70%

11 The period analysed was 1 January 2010 to 1 January 2018.

12 Article 5:50 in conjunction with Article 5:53 GALA.

13 The board of the ACM imposes the fine officially and has the final responsibility.

of cases (Othuijse 2017).<sup>14</sup> This rate has risen to 90% in recent years (Othuijse 2018). As mentioned, the ACM imposed a fine in 22 cartel cases since 1 January 2010. At least one or more undertakings filed an appeal in 19 of the 21 cases, which represents 90% of cases, and includes the 4 direct appeals. In all 15 cases in which the objection procedure was followed, one or more undertaking also filed an appeal. Analysed per undertaking, 126 followed the objection procedure after which 105 of the 126 undertakings challenged the objection decision in court which represents 83% of the companies. As the numbers show, the objection procedure is only effective to a limited extent in solving disputes.

Previous Dutch studies have shown that the way the objection procedure is organised, how the parties are treated and the general perceptions of the parties about the procedure affects the rate of cases which are litigated. The following sections analyse how the objection procedure functions in practice by questioning the parties involved in this procedure and examining the results of the procedure through a case analysis to analyse the ability of the cartel objection procedure to resolve disputes on basis of these previous studies.

### 3 The objection procedure in practice – experiences

To determine the experiences of the parties involved in the objection procedure, in-depth interviews were conducted separately with ACM officials and 14 Dutch practitioners from various law firms who were regularly involved in the decision-making and dispute resolution procedures in cartel fine cases. The decision to interview practitioners, instead of for example undertakings, was made based on the assumption that practitioners have a clearer impression of the functioning of the objection procedure, play as advisor of the undertaking an important role in the decision on how to proceed and are easy to approach.

The practitioners were selected as follows. First, an overview was compiled of the practitioners who assisted undertakings in public cartel enforcement procedures over the past fifteen years on the basis of all the relevant court judgments. This yielded overview included a total of more than 70 practitioners.<sup>15</sup> Subsequently, a shortlist of 20 practitioners was prepared by selecting the practitioners who were

14 This percentage was calculated on the basis of the cartel cases in which fines were imposed in the period 1998-2010. The analysis of the cases between 1998 and 2018 lead to a proportion of 81%: An appeal was filed to the Rotterdam District Court in 42 out of 52 cases. The legislative bill establishing the ACM in 2013 mentioned a proportion of 87% between the years 2000 and 2011, although it is unclear which type of cases are included in this calculation. *Parliamentary papers II* 2012/13, 33622, nr. 3, p. 12.

15 Two members of ACM's external advisory committee who were regularly involved in the objection procedure reviewed the shortlist to check whether the shortlist of 20 lawyers represented the lawyers who most often advised undertakings during objection procedures.

most frequently involved in these procedures and finally one practitioner per law firm was selected for the interview on the basis of experience and availability.<sup>16</sup> With regard to the ACM, interviews were conducted with 3 officials with years of experience with the decision-making and dispute resolution procedures (objection, appeal and further appeal) in cartel fines cases. The ACM decided which officials were interviewed.

The interviews were semi-structured and did not only concern the functioning of the objection procedure. The open-ended questions included the factors which influence the decision to lodge an objection, to file an appeal and to file a further appeal at the exclusively competent courts, and how the undertakings and officials experienced the various decision-making and dispute resolution procedures, the quality of the ACM's fining decisions, and the quality of the judicial review performed by the specialised courts. The interviews were recorded with the interviewees' consent, after which the interviews were typed out and analysed. This section discusses the results of this research which considers the functioning of the objection procedure.

### 3.1 *View of the practitioners*

The objection procedure has been criticised harshly by various authors (*inter alia* Biesheuvel 1996; Scholten 2002; Van der Meulen 2002; Wesseling & Ten Have 2013; Wiggers et al. 2014; Custers et al. 2016). As described in previous research (Jans & Outhuijse 2013), one of its most notorious critics in the past was the leading Dutch competition lawyer Mark Biesheuvel, who expressed his dissatisfaction with the objection procedure in the Dutch legal journal *Nederlands Juristenblad* more than 20 years ago (Biesheuvel 1996). To quote:

'Generally, the procedure involves a time-consuming and wholly unnecessary ritual filing past public servants who have dug themselves into entrenched positions [...] in practice, the procedure regularly amounts to a legal restraining order which wrongly denies individuals access to the courts for long periods, sometimes years.'<sup>17</sup>

Based on interviews with 14 legal practitioners who have regularly represented undertakings fined for cartel infringements, it follows that this continues to be the opinion of the current generation of practitioners 20 years later. On asking the practitioners: 'Can you describe how the objection procedure functions? What works well and what works less well?', the answers were unanimously negative. The dissatisfaction with the procedure mainly follows from the fact the practitioners have little confidence that their objections will be effective, in the sense of changing the ACM's mind and as a consequence its decision. In other words, there

16 The names of the lawyers and the law firms will not be made public because anonymity was guaranteed to the interviewees. The choice to interview the lawyers with the most experience instead a random selection of the 70 lawyers is an application of the purposeful sampling research method. These lawyers are 'key informants' who were most likely to provide rich sources of information. See Webley 2010; Patton 2002, p. 45.

17 Own translation of Biesheuvel 1996, p. 930.



is little chance that reconsideration will lead to different conclusions and that the objection decision which concludes the objection procedure will depart meaningfully from the original decision. According to the practitioners, this results from the fact that the same officials who wrote the original decision have to review their decision and the main elements which were already discussed on the basis of the penalty report. The officials have studied the case carefully, meaning that it is unlikely they will change their minds. Some practitioners noted that objecting to obvious mistakes in the calculation of the fine which had not been discussed in the preceding procedure, for example if a wrong turnover amount was used, can be successful. Furthermore, the ACM gets a chance to analyse the weaknesses of the decision and whether the decision is court-proof, and has an opportunity to amend the decision accordingly. This way the objections can lead to a stronger fining decision, which is not regarded as beneficial by the undertakings because it reduces the chance that the fine will be reduced or annulled completely in the court procedure. In sum, the objection procedure offers little benefits for the undertaking in the sense of fine annulment or fine reduction.

The external advisory committee (BAC) previously used by the ACM in the objection procedure was mentioned by many practitioners as a positive aspect of the objection procedure. According to the practitioners, the members of the BAC were highly qualified and reviewed the ACM's decision very critically. The practitioners mentioned, however, that the ACM did not take the BAC advice very seriously and that they knew it would not influence ACM's decision, but an advice which critically points out the weaknesses of the decision and therefore favours the undertaking could make the undertaking's case stronger in appeal. Several practitioners also mentioned that they were disappointed that the mandatory BAC had been abolished and would like to see it reinstated.<sup>18</sup> In addition, many practitioners said that they expected their views about the objection procedure to become even more negative now that the advisory committee had been made optional and is no longer used by the ACM during the objection procedure. As one of the practitioners noted:

'I have no experience yet with the new procedure. Based on my previous experience, I think that you had a small chance that the ACM would change its decision based on negative advice from the advisory committee. Without the advisory committee, this chance falls to zero. If I am correct, no objection has been upheld since the objection advisory committee was abolished and I would say that it is simply a task for the legislator to abolish the objection procedure in cartel cases.'<sup>19</sup>

Many practitioners noted that they would be in favour of abolishing the objection procedure because of the procedure's limited added value and the costs and delay which result from it. However, as mentioned by one practitioner, some undertakings might consider the long duration of the procedures as a benefit, for exam-

18 This has also been advocated in the literature, see *inter alia* Beumer 2016.

19 Own translation.



ple regarding the potential private enforcement which could follow the public enforcement. In addition, objections and appeals previously had a suspensory effect on a decision imposing sanctions and can prevent companies from being excluded from public procurement tenders.<sup>20</sup>

The general dissatisfaction with the procedure raises the question why the option of direct appeal is not used more often. After asking the practitioners this question, many responded that they did request it in many cases, but unsuccessfully. According to the practitioners interviewed, several reasons underlie this lack of success. The first reason is that direct appeal can only be allowed if all the undertakings want it, which is not always the case, including because some consider it as a missed opportunity.<sup>21</sup> Furthermore, the ACM has to agree. Although the competition authority has designated sanctions as decisions in which a direct appeal will in principle be approved (Böcker et al. 2010, p. 197), the ACM does not grant direct appeal easily in practice, according to the practitioners. They said that the underlying reason for this is that the objection procedure is valuable for the ACM because the ACM can correct mistakes and strengthen weaknesses. The third and final reason suggested is that recent practice shows that the District Court Rotterdam can also send direct appeal cases back after the ACM's approval. The District Court Rotterdam, for example, rejected a direct appeal in a recent case after the ACM granted the undertaking's request, stipulating that the case did not lend itself to direct appeal and that the objection procedure should be followed first.<sup>22</sup>

### 3.2 *View of the ACM*

The ACM's predecessor, the NMa, also expressed its dissatisfaction with the objection procedure and the preference to abolish the procedure.<sup>23</sup> The NMa considered the procedure to be a repetition of steps already taken, since the undertaking already had the chance to dispute the infringement in its response to the penalty report and the authority had had the opportunity to amend its original decision accordingly. Like the practitioners, the ACM officials interviewed were also not very positive in responding to the following question: 'Can you describe how the objection procedure functions? What works well and what works less well?'

According to the officials, the added value of the procedure depends on whether new facts, circumstances and arguments, or better substantiated arguments, are put forward in the objection procedure. If the procedure repeats the earlier decision-making phase, its added value is very limited and direct appeal would have been more beneficial, but that can often only be concluded in hindsight. Here the

20 Until 1 August 2014, the undertaking fined could defer the payment obligation by litigating the fine. In practice, this meant that the fine would have to be paid many years later, albeit with interest. The legislature felt that this was undesirable and changed the law stating that litigation can only delay the payment obligation by 24 weeks. See for information about this and the other benefits Outhuijsse 2018.

21 Article 7:1a (2) GALA.

22 ACM Decision on objection 15 December 2016, ACM/DJZ/2016/207499 (*H&S Coldstores*).

23 *Parliamentary papers II* 2001/02, 27639, nr. 33, p. 33 et seq.

officials underlined that the finding of the violation is already cross-checked by a new team of officials. The Competition department prepares the penalty report and transfers it to the Legal department which reviews the quality of the report and whether the imposition of a fine is justified on this basis. Before the imposition of the fine, there is a hearing conducted with the companies under investigation. After this hearing, these officials make a completely new assessment of the case which leads to the decision. If this phase went well, the objections should not raise often new points of discussion or require revision of the fining decision. The objection is however reviewed by largely a new team and the ACM is open for new or better substantiated arguments, which could lead to a revision of the decision after following the objection procedure.

The ACM officials recognise that the cartel objection procedure's ability of resolving disputes is limited and companies' acceptance of the fines imposed on them is very low. Although acceptance by the companies is not paramount for the authority but acceptance by society, the officials say that they favoured more cases ending in a settlement or commitment to resolve the dispute, though they noted that the initiative for this has to come from the ACM and is not very successful. The officials have the impression that practitioners are not motivated by dispute resolution but by assessing the weaknesses of a case to find sufficient points for dispute. The officials acknowledge that the ACM is however also not always open to settlement, but only in those cases in which there is no disagreement as to whether the undertaking has infringed the prohibition, the undertaking involved voluntarily admits the infringement, and sufficient efficiency benefits can be gained.

Furthermore, according to the officials, the objection procedure also does not serve dispute resolution in the sense of reducing the number of discussion points. In contrast, new arguments are raised during the court phase. The parties mainly focus on the facts of the case in the administrative phase, and save certain legal arguments for the court phase, though on the same factual grounds. According to the officials, the value of the objection procedure could be increased if the court was not as open to receiving new arguments and new counterevidence, such as new expert reports.

The officials were also asked whether they could describe the factors which influence the decision to allow direct appeals and whether this provides a solution. The officials described that, firstly, the request for direct appeal must come from the parties, and from all the parties, before the request can be granted. However, they explained that previously, if all parties except one requested it, the ACM would approach the remaining party with a request to proceed to direct appeal. Decisions to allow this are based on whether the case is ready for the court stage, including a consideration of whether there remain discussion points which are more suitable for the administrative phase. A direct appeal is for example granted if legal questions remain which cannot be solved during the objection phase. The ACM officials underlined that the influence of the ACM is limited, since the ball is on the other side and there have been merely a few of such requests from the companies in cartel cases in recent years. Another development described by the officials is the more proactive attitude of the court towards direct appeals. Previ-

ously, the court was receptive for accepting direct appeals, thereby relying on the ACM's analysis. Recently, the court did however not accept the direct appeal twice.<sup>24</sup> According to the officials, this could be in response to the *Bell Pepper* case, in which a direct appeal was granted but the court asked the ACM twice for clarification of certain concepts in the fining decision by issuing an interlocutory judgment to permit the ACM to remedy defects in the contested decision pending the appeal procedure. The case was maybe not suitable for direct appeal, but could only be said in hindsight. The officials consider that the court's recent, more active stance forces them to think critically about whether a case is genuinely ready for direct appeal. In contrast to the opinion of the practitioners, the ACM officials do not believe that there is a general tendency to ask for direct appeals and that ACM rejects all cases. In contrast, some companies prefer to follow the objection procedure, and then there is no option for the ACM to allow direct appeal, while the ACM definitely sees the benefits of direct appeal in some cases. On explicitly being asked, the officials mentioned that they would not mourn the abolishment of the objection phase. The officials also noted that they had also pointed out that this would be beneficial at the time of ACM's establishment. Benefits include the incentive to prepare very well developed primary decisions and an increase of the pace and acuity of the debate. However, they did mention that the ACM would then like to have, in exceptional circumstances such as new facts or circumstances, an opportunity to adapt the original decisions via, for example, an administrative loop.

### 3.3 *Reflection experiences involved parties*

Following from the previous sections, it can be concluded that neither of the parties involved are satisfied with the procedure. The practitioners have little confidence that their objections are effective in the sense of changing the ACM's mind and as a consequence achieving more favourable decisions. The ACM officials' dissatisfaction stems from the fact that the procedure repeats earlier decision-making steps and that the procedure is only able to resolve the dispute or to narrow it to a limited extent. In sum, the limited added value as described by the involved parties is twofold: (1) the objection decision rarely departs from the original decision and therefore does not provide added value to the original decision, and (2) the objection procedure does not solve the dispute or narrow it and therefore does not provide added value to the court procedure. Both points of criticism have been recognised by the legislator at various times. The first point seems to be a more general assumption which is revealed for instance by the fact that the legislator also expressed this assumption in the legislative memorandum to the introduction to the Direct Appeals Act.<sup>25</sup> According to the legislator, competition law is the perfect example of an area of law in which the direct appeal option would be beneficial, since the competition authority rarely makes mistakes in its original fining decision and therefore does not need the opportunity to reconsider and correct its decisions. Various authors, such as the authors who evaluated

24 In *Coldstores*, the court did not consider it convenient to split the case into two cases.

25 *Parliamentary papers II* 2001/02, 27 639, nr. 33, p. 33 et seq.

the Dutch Competition Act, have also observed that the objection decision hardly ever deviates from the original decision (SER 2003, p. 3; Scholten 2002; Van der Meulen 2002). In addition, the limited ability of the procedure to resolve disputes was one of the main reasons behind the proposal to abolish the objection procedure for ACM sanctioning decisions in the first draft of the bill establishing the ACM. The next section will describe the functioning of the procedure by analysing the cartel cases in the period 1998 to 1 January 2018, and verify whether the views noted are confirmed by analysing amongst others the actual objections and their success by comparing the primary fining decisions with the decision on objection.

#### 4 The objection procedure in practice – case studies

The second section demonstrated that the objection procedure is indeed only effective to a limited extent with regard to solving disputes: many cases were challenged in court after following the objection procedure. The case analysis also confirms the observation from the ACM's officials that the dispute is not narrowed down after following the objection phase. In many cases, the exact same grounds are raised during the court phase as had been during the objection phase. In some cases even more grounds were submitted and only in a limited number of cases were the number of grounds significantly reduced.

In general, undertakings raised objections (i) on procedural grounds, (ii) violation-finding grounds, and (iii) on fine-calculation grounds. The parties' objections are generally similar in type and scope across the decisions analysed: for (i), the procedural grounds would generally include an alleged violation of the right of defence, for example because of limited access to evidence; for (ii), parties would argue, again generally, that the alleged behaviour had not occurred, that there was insufficient evidence of its occurrence or that the ACM had insufficient regard for the economic context in which the behaviour occurred. Less commonly, depending on whether the decisions concerned multiple parties and natural persons, the parties would raise issues of accountability. For (iii), almost all the parties made arguments which concerned the duration of the conduct, the established turnover as basis for the fine, the severity of the infringement, the proportionality of the fine and the existence of mitigating circumstances which could reduce the fine.

The assumption expressed by the parties that the objection decisions do not depart from the original decisions is not fully confirmed by the case analysis. In fact, comparing the total of original decisions with the decisions on objection shows that objections were successful in quite a large proportion of cases, although the success has to be distinguished to the type of objection ground and should be viewed in light of the total objection grounds argued.

##### 4.1 *The success of the objections*

The objections on fine-calculation grounds are the most successful. Considering all the cases together since the establishment of the authority in 1998, the ACM

lowered the amount of the fine for one or more undertakings after reconsideration in the objection phase in more than 40% of cases.<sup>26</sup> This percentage is higher when analysing only the cases decided since 2010.<sup>27</sup> The ACM lowered the fine for one or more undertaking in 8 of the 15 cases for which the objection procedure was followed. The reduction per undertaking varies, however, from a few thousand euros to a few million euros. The reasons for lowering the amount of the fine vary widely, but the majority of cases can be divided into 3 categories: wrong qualification of the infringement, wrong basis for the fine and disproportionately high fine. The first two categories concern reductions as a consequence of an amendment to the fine calculation. The first category concerns cases in which a change to the infringement's qualification led to a reduction in the fine. In the *Laundries* case, the ACM followed the undertakings' objections and the advisory committee's advice that the qualification of their conduct as 'very severe' should be replaced by 'severe'. As a result, the ACM decreased the severity factor and the fines from € 13,426,000 to € 9,398,000, from € 2,343,000 to € 1,640,000, from € 2,143,000 to € 1,500,000 and from € 450,000 to € 159,000 respectively.<sup>28</sup> The ACM also lowered the severity factor in the veterinary medicines cases (*AUV* and *Aesculaap*) and the national association of general practitioners (*LHV*). In the latter case, the fine was reduced from € 7.7 to 5.9 million.

The requalification of the offence and the amendment of the severity factor which occurred in *LHV*, *AUV*, *Aesculaap* and *Laundries* are examples of a reconsideration of the same facts. The wrong basis for the fine category includes cases where the amendment of the fining decision is based on newly received information.<sup>29</sup> The ACM has to take new, relevant information into account based on the obligation to decide *ex nunc* in the objection procedure, which shows that the objection procedure is a form of extended decision-making. For example, in *Mobile Operators*, the ACM lowered the mobile operators' fines because the ACM had received new information from the undertakings which showed that the relevant turnovers were lower than expected, which justified lower fines. The fines

26 *Inter alia* in the following cases: *Notaries Breda*; *Mobile operators*; *Bicycle manufacturers*; *Shrimps*; *Bovag*; *Home care Midden-IJssel*; *Flour (for 7 of 15 companies)*; *Insulating double glazing*; *Wmo Friesland*; *Laundries*; *Foreclosure auctions*; *Taxi transport Rijnmond / IJsselsteden*; *LHV*.

27 The period analysed is 1 January 2010 to 1 January 2018.

28 The severity factor is a multiplication factor which is part of the fine calculation and can vary between 0 and 5 and between 0 and 3 before 2009. This factor's value depends on the severity of the violation, divided into three categories: very severe, severe and less severe.

29 The wrong basis for the fine category also includes examples of reconsideration of the same facts. In *Home Care Organisations Midden-IJssel* and *Insulating double glazing* the fine was reduced because the undertakings' objections convinced the ACM that the infringement's duration was shorter than had been assumed in the original fining decision and therefore the turnover used for the fine calculation was reduced. In the first case the fines were reduced by € 183,000 and € 642,000 respectively. In the second case, the reductions amounted € 626,000 and € 3,363,000.

were reduced by € 372,000 for T-Mobile, € 1,508,000 for Telfort, € 1,602,000 for Orange, € 13,680,000 for Vodafone Libertel and € 18,370,000 for KPN Mobile.<sup>30</sup> Fine reductions in the third category concerned the fine's amendment after the calculation of the fine rather than the calculation of the fine itself. In *Reading folders* the ACM lowered the fine for 7 undertakings on the basis of the proportionality principle. The original fines for these 7 undertakings amounted to between € 450,000 and € 583,000 and were reduced to € 125,000 for one undertaking and € 250,000 for the other 6 undertakings.<sup>31</sup>

Objections on violation-finding grounds were successful in some cases, although much less successful than the objections on fine-calculation grounds. Taking all the cases together, the competition authority decided not to impose a fine on one or more undertakings after reconsideration in the objection procedure in 20% of cases.<sup>32</sup> The main reasons for not imposing a fine include cases where the ACM concluded that it had insufficient evidence or had insufficient regard for the economic context in which the companies operated, often after the advisory committee had issued a similar advice. This percentage drops to 13% if only the cases since 2010 are considered. The undertakings followed the objection procedure in 15 of the 21 cases in that period and the ACM decided not to impose a fine on one or more undertakings in 2 cases.<sup>33</sup> *Caraat* is a 'recent' example in which the ACM concluded it had insufficient evidence to prove the infringement after the advisory committee issued similar advice. The fines imposed amounted € 1,343,000 and € 3,000,000.

The case of *Nozema Services and Broadcast* is an example of insufficient regard for the economic context. In November 2005, the ACM imposed a fine on these undertakings of over € 1 million. In response to the objections, the ACM withdrew the fines because the evidence from the investigations conducted could not sufficiently establish an agreement between Nozema and Broadcast which amounted to an *appreciable restriction of competition*. This finding was consistent with the developments in the case law at that time, which placed increasing demands on the competition authority to conduct research to demonstrate a restriction of competition.<sup>34</sup>

30 New information on turnover also led to fine reduction in the *Shrimp* case, since the relevant turnovers were lower than had been assumed. The reduction varied from a few thousand to a few million euros. As in the other cases, the *Swimming pool chlorine* case shows that the objection procedure provides an opportunity for the undertakings to complete information that was omitted before. Breustedt Chemie provided its turnover numbers for the first time in the objection procedure, which led to a reduction in the fine to € 1,016,000 from € 1,440,000. The ACM had needed to estimate Breustedt Chemie's turnover for the original fining decision.

31 The same occurred in *Notaries of Breda*: Following the advisory committee's advice, the ACM decided to reduce the fine since the economic value of the municipality assignments were limited in relation to the notaries' total incomes.

32 *Cleaning industry* (no fine for a number of companies); *Nozema and broadcast*; *Shrimps* (no fine for a number of companies); *Caraat*; *Demolition companies* (no fine for a number of companies).

33 The percentage would be higher if the fines imposed on natural persons would have been included in the research.

34 CBb 7 december 2005, ECLI:NL:CBB:2005:AU8309 (*Secon*).



In some other cases the objection was only successful for some or only one of the undertakings involved. In *Cleaning industry*, for example, the fines for 3 out of 4 undertakings were withdrawn because of insufficient evidence of their involvement. The same was done in the *Shrimp* case where the fine was withdrawn for 5 smaller shrimp dealers.

The ACM left the original decisions completely in place in 47% of cases.<sup>35</sup> This percentage drops to 27% for the cases since 2010, although this counts for all 3 most recent cases. Objections on procedural grounds, such as alleged violation of access to evidence, were particularly unsuccessful. In many of the cases in which the ACM left the original decisions completely in place, the ACM left the decision in place with providing additional reasoning. The additional reasoning concerned various elements of the fining decisions, but common subjects included that the behaviour had the object and capability to restrict competition, and also elements of the fine calculation such as the severity factor and the turnover applied in fine calculation.

#### 4.2 *Reflection case analysis in light of experiences*

The previous section showed that the objection procedure is and has been criticised harshly on the strength of the generally held belief among stakeholders that the objection decision does not depart from the original decision and that this explains the limited effectiveness of the objection procedure. The empirical comparison of the original decision and the decision on objection shows that this is not completely justified. The ACM concluded that the objections were completely unfounded in only 4 out of 15 recent cases. In other words, the ACM decided not to impose a fine or to lower the amount of the fine in several decisions on objection. In addition, in some of the objections declared unfounded, the ACM provided additional reasoning, thereby changing the original decision, albeit that this is usually not beneficial for the undertaking. In sum, the assumption that the objection decision does not depart from the original decision is not fully justified. However, the stakeholders' claims are understandable and not entirely unjustified. We should bear in mind that this section considers any departure from the original decision following the objection procedure and therefore highlights the successful grounds for objection. Only one argument needs to succeed for a departure from the original decision to be counted. In practice, however, many elements of the fining decision, and sometimes all the available elements, are disputed during the objection procedure, with most arguments being unsuccessful. In general, the fined parties raised all three types of objections: procedural, violation finding and fine-calculation grounds. Most of these arguments fail and do not lead to a change in the decision, which might give the practitioners the impression that the objection is not very effective. In addition, the fine-calculation objections are the most successful compared to the procedural and violation-finding objections, which generally have the least substantive impact. Moreover,

35 Examples include *G-star/Secon*; *Texaco tankstations*; *Soletanche Bachy*; *Limburg construction companies*; *Bencis*; *Garageboxes*; *Coldstores*.



the last 3 cases which followed the objection procedure were declared completely unfounded. Finally, there are additional aspects which contribute to the impression that the objection is not very effective.

One example is the role that the advisory committee used to play in the objection procedure. According to the practitioners interviewed, the members of BAC were highly qualified, reviewed the ACM's decisions very critically and pointed out the decisions' weaknesses and advised the ACM to revise them, which was all very positive for the fined undertakings. The practitioners noted that the ACM did not take the BAC's advice very seriously and that they knew it would not influence ACM's decision. My previous research, which included an empirical analysis of the BAC's advice and the competition authority's subsequent decisions between 1999 and 2009, confirmed that the ACM rarely followed the BAC's advice if it advised the ACM to adapt its decision (Jans & Outhuijse 2013).<sup>36</sup> This research was not limited to cartel fining decisions, but the comparison of the original decisions and objection decisions for cartel cases from 2010 to 2018 shows a similar picture.

As seen in the abovementioned examples, there are cases in which the ACM changed its decision by following the advice of the BAC. The only decision in recent cases in which the BAC advice was fully adhered to by the final ACM decision is *Caraat*, in which the BAC stated in rather strong terms that there was no violation of the cartel prohibition due to a misreading of certain clauses of the alleged non-compete agreement. In many other decisions, the BAC advice has seemed to instruct the ACM to 'substantiate more elaborately' certain weaknesses, legal or economic, in the analysis, which the ACM adhered to in some cases, resulting in a seemingly refined decision. The advisory committee however also fairly regularly recommended gathering more evidence or reducing the fine, which the ACM did not follow.<sup>37</sup> The fact that the ACM did not follow that advice probably strengthened the practitioners' impression that the objection is only effective to a limited extent.

36 The analysis of 34 competition cases in the period 1999 to 2009 showed that the authority departed, to a greater or lesser extent, from the BAC's recommendation in 50% of the cases. In only 9 of the 17 cases in which the ACM followed the recommendation, the ACM did this without any reservation at all. In the other 8 cases, it gave different and/or additional reasons for its decision on the objection. The authority followed the recommendation in all cases where the BAC advised declaring the objection unfounded. In other words, the authority only departed from the recommendation when the BAC advised that all or part of the objection should be declared well founded.

37 For example, in *Home care organizations* and *Insulating double glazing*, the ACM reduced the amount of the fine, while the BAC opined there was insufficient evidence to establish the infringement, an opinion which the District Court Rotterdam later confirmed. Another example is the *Foreclosure auction* case. In this case, the BAC had already pointed out to the ACM that the causal connection between the joint enrolment and the cooperation in the mining phase established by the ACM required further substantiation. The TIAT subsequently concluded that the ACM had not provided sufficient evidence to qualify the alleged conduct as a single and continuous infringement and therefore to fine more than 70 real estate traders.

## 5 The ability of the cartel objection procedure to resolve disputes

The objection procedure is intended as an easily accessible and informal procedure for resolving disputes. Following the objection procedure should prevent such disputes from resulting in lengthy, formal appeal procedures. In contrast to cartel cases, a large majority of the administrative disputes are settled in the objection procedure (Van Erp & Klein Haarhuis 2006; Marseille et al. 2017; Van Ettehoven & Marseille 2017), albeit that the exact percentage differs per area of law and the organisation of the procedure: informal, formal without an advisory committee opinion and formal with one (*inter alia* Herweijer & Lunsing 2011).

Several empirical studies have shown that the success of the procedure depends on the formality of the procedure: citizens who have followed an informal procedure appear to give higher average report grades than citizens who have gone through a formal procedure (Van der Velden et al. 2010; De Waard 2011; Van der Velden et al. 2011). In this context, an informal approach will more often cause a citizen to accept the outcome of the procedure even if the result is not in its favour, which can be explained by the theory of procedural justice (Herweijer & Lunsing 2011). The informal approach mostly consists of civil servants seeking contact with the objectors from an open, interested and solution-oriented perspective to determine what the problem is and hopefully to reach agreement with the citizen to solve the dispute in that way. In contrast to the formal approach in which the authority merely reviews the legality of the decision, the informal approach is a solution-oriented method. The informal approach is however not suitable for every dispute and depends on many factors, such as specific features of the area of law – for example whether the law provides discretion to the authority to agree compromises – and the motive for the dispute (see *inter alia* Wever 2017).

Herweijer and Lunsing concluded in their meta-analysis of previous Dutch empirical studies that the success of the objection procedure, in the sense that the dispute was resolved, depends on the nature of the dispute, why the objection was made and how the procedure was organised, in the sense of whether the level of formality meets the first two points (Herweijer & Lunsing 2011). The authors distinguish 5 motives for objection: objections can arise from an information need, be a reaction to an administrative error, concern a complaint about the treatment the actor received from the authority, be the result of insufficient adaption of the application of the law to the specific situation or concern a fundamental dispute. An administrative error means that the decision is based on evidently incorrect assumptions which can easily be corrected by the authority after becoming aware of this mistake. This is a different situation to that where the background for lodging the objection is formed by a fundamental dispute. In the case of a fundamental dispute, the difference of opinion is not based on, for example, obvious wrongly established facts, but the dispute concerns the applicability or interpretation of facts or law and the official sees no possibility to meet the wishes of the citizen. The citizen is however also not willing to accept the decision and continues to object to the decision made. According to Herweijer and Lunsing, the treatment of each objection should be tailored to the nature of the objection and

the nature of the objection has consequences for the possible success of the dispute resolution.

Herweijer and Lunsing state that an informal objection procedure is best suited for objections arising from information needs, an administrative error, a treatment issue or a lack of adaptation. In other words, a misunderstanding can be solved, an administrative error can be rectified, the air can be cleared in a treatment issue and adaption can be provided (see also Van Ettehoven & Marseille 2017). This is different in the case of a fundamental dispute. Only an intervention by a third party can offer a solution. It is possible that an objection advisory committee – or a court in the appeal stage – can convince the parties of a solution or find an opportunity to enter into discussions with the parties. The authors conclude that objections concerning a fundamental dispute can best be dealt with in a quasi-judicial objection procedure, therefore a procedure with advice from an external objection advisory committee, and the other objections as informally as possible.

The analysis of the interviews, the objections and the decision on the objections show that these cartel disputes are fundamental in nature, sometimes combined with administrative errors or insufficient adaptation of the rule to the specific situation. As mentioned by the practitioners, the obvious errors, for example with regard to the calculation of the fine – such as using the wrong turnover, which was undiscussed in the preceding procedure – can be solved during the objection procedure. The grounds for objection are usually, however, not limited to these types of grounds and include procedural aspects, violation-finding aspects and fine-calculation aspects, which gives the impression that the nature of the dispute concerns a fundamental dispute. Within these grounds, the parties focus particularly on the interpretation and relevance of facts, arguing that the outcome of such a determination alters the finding of a violation, or the imposition of the fine, or the amount thereof. The grounds are not focussed on receiving better motivated decisions or finding a compromise. The fact that all or many elements of a fining decision are disputed indicates that the undertaking's aim is to prevent the imposition of a fine and if that provides impossible, obtaining the largest fine reduction possible. The ACM is not willing to meet companies' wishes in every case, for perfectly logical and well-grounded reasons in most cases. It could also be said that the authority actually does not have the discretion to adjust the decision in such a way that the interests of the objector are met, without harming other interests. For example, both the Dutch legislator and European actors specifically require the ACM to impose deterrent sanctions in case of cartel infringements (De Moor-Van Vugt & Widdershoven 2017, p. 275-285).<sup>38</sup>

38 The legislator is requesting the authority to impose higher fines to increase deterrence. An example of this is the legislative bill which raised the maximum amount of cartel fines on the 1 July 2016 from € 450,000 to € 900,000 or 10% of the annual turnover of the undertaking if the latter is higher. If the infringement lasted longer than 2, 3 or 4 years, the maximum fine is raised to € 1.8, 2.7 or 3.6 million, respectively, or to 20, 30 or 40% of annual turnover. This amount can even be doubled for recidivists to the maximum of either € 7.2 million or 80% of annual turnover – whichever is higher.

In addition, the courts can and do give the companies what they are aiming for in the sense of large fine reductions or full annulments suggesting that more could be gained from litigation than would be conceded upfront by the competition authority. Previous research showed that undertakings are in general very successful in obtaining large fine reductions or full annulment fines during court proceedings, and additionally, appealing decisions has other financial benefits which incentivise undertakings to litigate (Outhuijse 2018). Challenging cartel fines in court prevents exclusion from future public tenders, delays follow-on damages claims and in the past also delayed the payment of the fine. In other words, challenging a decision has additional benefits for undertakings beyond the fine reductions. Although different studies in other areas than Dutch competition law showed the independent influence of procedural justice on the satisfaction of individuals with the decisions of administrative authorities and demonstrated that the improvement thereof can increase the acceptance of these decisions, this and previous studies shows that Dutch cartel enforcement practice would not benefit from this since this is not the type of factor which influence the decision to challenge the decision in court (Outhuijse 2018).

In conclusion, on the basis of previous empirical studies, Dutch cartel disputes seem to be simply unsuited to being solved in the objection procedure because of the nature of the dispute being a fundamental dispute and the incentives to challenge the fine in court. Reorganising the objection procedure, for example by decreasing its formality – which has been shown to be successful in other areas of law in several studies – would not increase the cartel objection procedure's ability to resolve disputes.

## 6 Summary and concluding remarks

Companies fined for infringing the cartel prohibition are denied access to the courts until the ACM has reviewed its fining decision in the objection procedure. The general experience with this procedure is positive in areas other than cartel cases because its ability to solve disputes and therefore prevent high litigation rates. Several stakeholders have been negative about the functioning of this objection procedure in case of cartel fines, including because of its limited ability to resolve disputes and the cost and length of the procedure. In light of the discussions on the effectivity of this objection procedure, this article analysed the ability of the cartel objection procedure to resolve disputes on basis of an analysis of the decisions on objection, as well as interviews with the parties involved in the objection procedure and a study of the relevant literature.

The interviews confirmed that neither of the parties involved are satisfied with the procedure. The practitioners have little confidence that their objections are effective in the sense of changing the ACM's mind and as a consequence achieving more favourable decisions. They seem to measure effectiveness on the basis of the procedure's outcome. The ACM officials' dissatisfaction stems from the fact that the procedure repeats earlier decision-making steps and that the procedure is only able to resolve the dispute or to narrow it to a limited extent. Both points

of criticism have been recognised by academics and the legislator at various times. The case analysis, which included amongst others an analysis of the actual objections and their success by comparing the primary fining decisions with the decision on objection, however showed that the practitioners' and academics' assumptions about the failure of the objections to obtain decisions which differ from the original decisions is not completely confirmed. In many cases, the original fining decision was changed and the fine was reduced.

The article ended by explaining the limited ability of the cartel objection procedure to resolve disputes on the basis of previous Dutch studies, which have shown that the success of the objection procedure, in the sense that the dispute was resolved, depends on the nature of the dispute, the reason that the objection is made and how the procedure is organised. The article demonstrated that the cartel fine dispute is fundamental in nature and simply not suited to being solved in the objection procedure. Although different studies in other areas than Dutch competition law showed the independent influence of procedural justice and demonstrated that the improvement thereof can increase the acceptance of these decisions, this study shows that Dutch cartel enforcement practice would not benefit from this since this is not the type of factor which influence the decision to challenge the decision in court and therefore the percentage of litigation (Outhuijse 2018). Therefore, a reorganisation of the objection procedure, for example by decreasing its formality, will not increase the procedures dispute resolution effectiveness as long as the companies continue to be as successful in appealing their cases in court.

As some practitioners described, these findings contribute to the idea that the objection procedure could and should be abolished. Follow-up research should explore in greater detail whether this is wise and desirable. It should be seen, for example, what the exact consequences are of this decision, for example regarding benefits of the objection procedure other than dispute resolution which will be lost as a consequence of abolishing the procedure (Jans & Outhuijse 2013) and whether and how other decision-making and dispute resolution procedures should be adjusted to compensate for the loss of the objection procedure. Although rushing to conclusive advice in this discussion is tempting, an in-depth assessment of the desirability and positive and negative consequences of these options is needed to formulate sustainable solutions. This however goes beyond this article and requires follow-up research.

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